

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SCOTT D. SEXTON and SONIA L.
 SEXTON, husband and wife,

Plaintiffs,

v.

INDYMAC BANK, FSB, et al.,

Defendants.

3:11-cv-437-RCJ-WGC

ORDER

This is a foreclosure case involving a single property. Defendant LSI Title Agency, Inc. ("LSI") has moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6). For the following reasons, the Court grants in part and denies in part the motion to dismiss (#13).

BACKGROUND¹

In 2007, Plaintiffs Scott and Sonia Sexton ("Plaintiffs") obtained a loan from Indymac Bank, FSB in the amount of \$752,000.00. (Compl. (#1-2) at 23). To secure the loan, a deed of trust was executed against 5 Pecetti Circle, Reno, Nevada 89511 (the "Property") on April 24, 2007 (the "Deed of Trust"). (Deed of Trust (#14-2) at 1-3). The Deed of Trust listed Indymac Bank, FSB as lender, Stewart Title Guaranty Company as trustee, and Mortgage

¹ Defendant LSI has requested judicial notice to be taken of attached copies of relevant publicly recorded documents. (See Req. for Judicial Notice (#14)). The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 Electronic Registration Systems, Inc. (“MERS”) as nominee. (*Id.* at 2).

2 Some time later Plaintiffs defaulted on the loan. (See Notice of Default (#14-3)). On
3 August 18, 2010, NDEX West, LLC (“NDEX”) recorded a notice of default and election to sell
4 under deed of trust, claiming to be the trustee under the Deed of Trust. (*Id.*). MERS assigned
5 all beneficial interest in the Deed of Trust to Deutsche Bank National Trust Company
6 (“Deutsche Bank”) on September 2, 2010. (Assignment (#14-4)). On September 20, 2010,
7 Deutsche Bank formally substituted NDEX as trustee. (Substitution of Trustee (#14-5)). A
8 notice of trustee’s sale was then executed by NDEX on April 28, 2011 and recorded by LSI on
9 May 4, 2011. (Notice of Trustee’s Sale (#14-6)).

10 On May 12, 2011, Plaintiffs filed this complaint in the Second Judicial District Court of
11 the State of Nevada against Indymac Bank, FSB; NDEX; and LSI, among others. (Compl. (#1-
12 2)). The complaint alleges nine causes of action, including: (1) debt collection violations under
13 NRS § 649.370; (2) unfair and deceptive trade practices under NRS § 598.0923; (3) unfair
14 lending practices under NRS § 598D.100; (4) violation of the covenant of good faith and fair
15 dealing; (5) violation of NRS § 107.080; (6) quiet title; (7) fraud in the inducement and through
16 omission; (8) slander of title; and (9) abuse of process. (Compl. (#1-2) at 24-48).

17 The action was then removed to this Court on June 21, 2011. (Petition for Removal
18 (#1)). Defendant LSI filed a motion to dismiss for failure to state a claim pursuant to Fed. R.
19 Civ. P. 12(b)(6) on September 27, 2011. (Mot. to Dismiss (#13)).

20 LEGAL STANDARD

21 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test
22 the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
23 “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled
24 to offer evidence to support the claims.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th
25 Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

26 To avoid a Rule 12(b)(6) dismissal, a complaint must plead “enough facts to state a
27 claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
28 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim

1 is plausible on its face “when the plaintiff pleads factual content that allows the court to draw
 2 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
 3 *Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Although detailed factual allegations are
 4 not required, the factual allegations “must be enough to raise a right to relief above the
 5 speculative level.” *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be
 6 accepted as true and all reasonable inferences that may be drawn from the allegations must
 7 be construed in the light most favorable to the nonmoving party. *Broam v. Bogan*, 320 F.3d
 8 1023, 1028 (9th Cir. 2003).

9 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 10 leave to amend. The court should freely give leave to amend when there is no “undue delay,
 11 bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing
 12 party by virtue of allowance of the amendment, [or] futility of amendment.” *Foman v. Davis*,
 13 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave to amend is only
 14 denied when it is clear that the deficiencies of the complaint cannot be cured by amendment.
 15 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

16 DISCUSSION

17 LSI filed a motion to dismiss all nine causes of action against it for failure to state a
 18 claim. (Mot. to Dismiss (#13)). Plaintiffs timely responded and LSI filed a reply. (Opp’n to
 19 Mot. to Dismiss (#17); Reply (#20)).

20 In Plaintiffs’ first cause of action for debt collection violations under NRS § 649.370,
 21 Plaintiffs have failed to state a claim because LSI is not a debt collector as required by the
 22 statute. NRS § 649.370 states that a violation of the federal Fair Debt Collection Practices Act
 23 (“FDCPA”), 15 U.S.C. §§ 1692 et seq., along with all regulations adopted under the Act is a
 24 violation of Nevada law. For a defendant to be liable for a violation of the FDCPA, the
 25 defendant must be classified as a “debt collector” within the meaning of the Act. *Heintz v.*
 26 *Jenkins*, 514 U.S. 291, 294 (1995); *McCurdy v. Wells Fargo Bank, N.A.*, 2010 WL 4102943,
 27 at *3 (D. Nev. 2010). A “debt collector” is defined by the FDCPA as a person “who regularly
 28 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed

1 or due another.” 15 U.S.C. § 1692a(6). Foreclosure pursuant to a deed of trust does not
2 constitute debt collection under the FDCPA. *Camacho-Villa v. Great W. Home Loans*, 2011
3 WL 1103681, at *4 (D. Nev. 2011). Additionally, “the FDCPA’s definition of ‘debt collector’
4 does not ‘include the consumer’s creditors, a mortgage servicing company, or any assignee
5 of the debt, so long as the debt was not in default at the time it was assigned.’ ” *Id.* (quoting
6 *Croce v. Trinity Mortg. Assurance Corp.*, 2009 WL 3172119, at *2 (D. Nev. 2009)). As the
7 Property was being foreclosed upon pursuant to a deed of trust, LSI does not qualify as a
8 “debt collector” within the meaning of the FDCPA, and consequently neither the FDCPA nor
9 NRS § 649.370 apply.

10 Plaintiffs’ second cause of action alleging unfair and deceptive trade practices in
11 violation of NRS § 598.0923 is also dismissed. Under the statute, a person engages in a
12 deceptive trade practice when he or she knowingly conducts business without all required
13 state, county or city licenses. NEV. REV. STAT. § 598.0923(1). The statute however explicitly
14 states that the following activities do not constitute doing business in the State of Nevada: (1)
15 maintaining, defending or settling any proceeding; (2) creating or acquiring indebtedness,
16 mortgages, and security interests in real or personal property; and (3) securing or collecting
17 debts or enforcing mortgages and security interests in property securing the debts. NEV. REV.
18 STAT. 80.015(1)(a), (g)-(h). Because LSI in this mortgage-related case is not considered to
19 have been doing business in Nevada, NRS § 598.0923 does not apply and this cause of
20 action is dismissed without leave to amend.

21 The Court also dismisses Plaintiffs’ third cause of action for unfair lending practices
22 under NRS § 598D.100 because the statute of limitations has run on this claim and because
23 LSI did not originate the loan. Plaintiffs allege LSI engaged in unfair lending practices by luring
24 Plaintiffs into obtaining the loan based solely on the future equity of the home in violation of
25 NRS § 598D.100. (Compl. (#1-2) at 27). An action “upon a statute for a penalty or forfeiture”
26 has a two-year statute of limitations, unless the statute provides otherwise. NEV. REV. STAT.
27 § 11.190(4)(b). The plain language of the statute indicates that it is a statute for a penalty and
28

1 does not contain its own limitations period, and consequently the statute of limitations period
2 on this claim is two years. See NEV. REV. STAT § 598D.110. As the loan was extended in
3 2007 and Plaintiffs did not file their complaint until 2011, the statute of limitations has run on
4 this claim. Additionally, NRS § 598D.100 only applies to lenders and not to parties who did
5 not originate the loan. NEV. REV. STAT. § 598D.100 (stating it is an unfair lending practice for
6 a *lender* to engage in the prohibited conduct); *Velasquez v. HSBC Mortg. Serv.*, 2009 WL
7 2338852, *3 (D. Nev. 2009) (dismissing a claim against defendants who were not the
8 originators of the loan). LSI merely recorded the notice of trustee's sale and is not accused
9 to have originated the loan, and consequently this cause of action lacks merit.

10 Plaintiffs have also failed to state a claim in their fourth cause of action for violation of
11 the covenant of good faith and fair dealing. Nevada law holds that "[e]very contract imposes
12 upon each party a duty of good faith and fair dealing in its performance and its enforcement."
13 *A.C. Shaw Constr. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting RESTATEMENT
14 (SECOND) OF CONTRACTS § 205). To succeed on a cause of action for breach of the covenant
15 of good faith and fair dealing, a plaintiff must show: (1) the plaintiff and defendant were parties
16 to an agreement; (2) the defendant owed a duty of good faith to the plaintiff; (3) the defendant
17 breached that duty by performing in a manner that was unfaithful to the purpose of the
18 contract; and (4) the plaintiff's justified expectations were denied. *Perry v. Jordan*, 900 P.2d
19 335, 338 (Nev. 1995). LSI here is not alleged to have been in a contractual relationship with
20 Plaintiffs, and therefore Plaintiffs' claim for violation of the covenant of good faith and fair
21 dealing fails.

22 Plaintiffs have however stated a claim under their fifth cause of action for violations of
23 NRS § 107.080. Under Nevada law, before any foreclosure sale may proceed, a notice of
24 default must be filed by the beneficiary, trustee or authorized agent of one of these. NEV. REV.
25 STAT. § 107.080(2)(c). Only after a notice of default is properly recorded can the party
26 authorized to make the sale under the terms of the deed of trust file a notice of trustee's sale.
27 NEV. REV. STAT. § 107.080(4). Although LSI apparently claims it was acting as an agent of
28 NDEX in recording the notice of trustee's sale, NDEX had no authority to file the notice of

1 trustee's sale because no properly authorized notice of default had been recorded. NDEX
2 executed the notice of default on August 18, 2010, but NDEX was not properly substituted as
3 trustee until September 20, 2010. (Notice of Default (#14-3); Substitution of Trustee (#14-5)).
4 Because NDEX had no authority to file the notice of default, the later filing of the notice of
5 trustee's sale which relied upon this notice of default was improper. Accordingly, Plaintiffs
6 have properly stated a cause of action for violations of NRS § 107.080.

7 In the sixth cause of action for quiet title, Plaintiffs fail to state a claim because LSI is not
8 claiming an interest in the Property. To succeed on a quiet title claim the plaintiff must allege
9 that the defendant is unlawfully asserting an adverse claim to title to real property. *Clay v.*
10 *Scheeline Banking & Trust Co.*, 159 P. 1081, 1082 (Nev. 1916); *see also Kemberling v. Ocwen*
11 *Loan Serv., LLC*, 2009 WL 5039495, at *2 (D. Nev. 2009). LSI has asserted no interest in the
12 property by filing the notice of trustee's sale because it filed the document as an agent of
13 NDEX. Plaintiffs seem to acknowledge that it is NDEX, not LSI, that is asserting an interest
14 in the Property by claiming NDEX executed the notice of trustee's sale and that LSI was only
15 acting as an agent of NDEX when it recorded the document. (Compl. (#1-2) at 6, 20).
16 Because Plaintiffs seem to concede LSI is not asserting an adverse interest on its own behalf,
17 Plaintiffs fail to state a claim on this count.

18 In the seventh cause of action for fraud in the inducement and through omission,
19 Plaintiffs have again failed to state a claim because the allegations do not apply to LSI and
20 because Plaintiffs have not sufficiently plead the facts related to the fraud. Under Nevada law,
21 a claim of fraud requires the plaintiff to establish each of the following elements: (1) a false
22 representation; (2) knowledge or belief that the representation was false (or knowledge that
23 the defendant's basis for making the representation was insufficient); (3) intent to induce the
24 plaintiff to consent to the contract's formation; (4) justifiable reliance upon the
25 misrepresentation; and (5) damage resulting from such reliance. *J.A. Jones Const. Co. v.*
26 *Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004). Pursuant to Fed. R. Civ. P.
27 9(b), a party alleging fraud "must state with particularity the circumstances constituting fraud
28 or mistake." To satisfy this standard, a plaintiff must plead "an account of the 'time, place, and

1 specific content of the false representations as well as the identities of the parties to the
2 misrepresentations.’ ” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting
3 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). Plaintiffs cannot make out
4 a claim of fraud against LSI because LSI is not accused of making false representations to
5 induce Plaintiffs to enter into the loan agreement. LSI only filed the notice of trustee’s sale
6 and played no part whatsoever in the loan agreement. Additionally, Plaintiffs’ fraud allegations
7 lack the specificity required by Rule 9(b) because Plaintiffs have failed to state with
8 particularity the alleged fraudulent acts LSI committed, and when and where these fraudulent
9 actions took place. Therefore, the Court dismisses Plaintiffs’ seventh cause of action without
10 leave to amend.

11 The eighth cause of action for slander of title fails because LSI did not record the notice
12 of default and because the statements were not untrue. Plaintiffs allege that LSI slandered
13 their title to the Property by recording the notice of default knowing that it was unauthorized
14 to foreclose and knowing the filed document was defective. (Compl. (#1-2) at 45-46). To
15 succeed on a slander of title claim, the plaintiff must show “false and malicious
16 communications, disparaging to one’s title in land, and causing special damage.” *Exec.*
17 *Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 478 (Nev. 1998) (quoting *Higgins v. Higgins*,
18 744 P.2d 530, 531 (Nev. 1987)). LSI however only recorded the notice of trustee’s sale and
19 did not record the notice of default. Even if LSI had recorded both documents, these
20 documents were not false because Plaintiffs concede that they have defaulted under the note
21 and the Property was intended to be sold. For these reasons, Plaintiffs eighth cause of action
22 lacks merit.

23 Plaintiffs have also failed to state a claim on their ninth and final cause of action for
24 abuse of process because Plaintiffs have not plead any facts demonstrating that LSI had an
25 ulterior purpose in foreclosing, and because nonjudicial foreclosures are not considered
26 “process” for the purposes of this tort. To prevail on a claim of abuse of process, the plaintiff
27 must show that the defendant (1) had an ulterior purpose in bringing legal action other than
28 resolving a legal dispute, and (2) wilfully used the legal process in a manner that is not proper

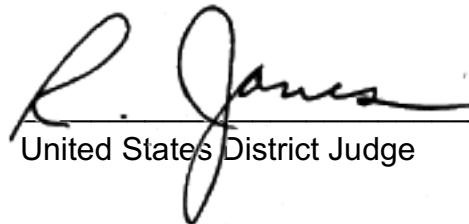
1 in the regular conduct of the proceeding. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d
2 465, 478 (Nev. 1998). Yet Plaintiffs have plead no facts that would show LSI had any ulterior
3 motive in bringing the foreclosure action. Additionally, nonjudicial foreclosures are not the type
4 of "process" the tort of abuse of process was intended to address because by its very
5 definition it does not involve judicial action. See *Barlow v. BNC Mortg., Inc.*, 2011 WL
6 3841223, at *4 (D. Nev. 2011). Accordingly, Plaintiffs' ninth cause of action lacks merit and
7 is dismissed without leave to amend.

8 CONCLUSION

9 For the above reasons, IT IS ORDERED that LSI's motion to dismiss (#13) is granted
10 on all counts except count five (violation of NRS § 107.080). LSI's motion to dismiss count five
11 is hereby denied.

12 DATED: This 23rd day of February, 2012.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


United States District Judge